No. 82-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

—v.—

HERMAN DELGADO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

UNITED STATES CONSTITUTION:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the principles of personal freedom embodied in the Bill of Rights.

Among those freedoms is the right to be secure from unreasonable government seizures. The Fourth Amendment erects a critical barrier between the government and all persons on our soil, conferring upon us, "as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In an era of recurring tension between that right and popular demands for more effective law

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[1] Letters of consent to the filing of this brief have been obtained from the parties and filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

enforcement, the amicus has consistently urged this Court to resist the erosion of that basic liberty.

In this case, the Immigration and Naturalization Service (the "INS") argues that it should be permitted to detain masses of persons for questioning, not on the basis of individualized suspicion, but solely on the basis of their geographical location and ethnic background. Such dragnet activity is unfaithful not only to the language of the Fourth Amendment, but to its history and spirit. Mass detentions, in which individual persons detained are not themselves suspected of any wrongdoing, are wholly antithetical to our constitutional heritage.

Accordingly, the amicus urges this Court to affirm the decision of the Ninth Circuit, which found that mass detentions

without individualized suspicion violate the Fourth Amendment.

STATEMENT OF THE CASE

In this action, the INS seeks the unprecedented constitutional authority to detain all persons found at geographic locations where it suspects there may be some undocumented aliens, without any particularized suspicion that any of the persons seized are actually present in the United States illegally.

While the INS calls these mass detentions "area control operations," they are not merely border inspections of the kind which this Court has previously considered. Rather, they are carried out throughout the United States: in factories; in urban neighborhoods; on public

transportation.[2] Nor are they brief stops of motor vehicles for cursory questioning of passengers; they are seizures of entire work forces lasting up to two hours, while INS agents conduct systematic interrogations of workers of one ethnic background.

The specific area control operations at issue here are three raids which the INS conducted at factories in Southern California in 1977.

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2 The INS appears routinely to seize unsuspecting and unsuspected persons not only in workplaces (see Babula v. INS, 665 F.2d 293 (3rd Cir. 1981); Blackie's House of Beef, Inc. v. Castillo. 659 F.2d 1211 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982)), but also on the public streets (see Marquez v. Kiley, 436 F. Supp. 100, 104 (S.D.N.Y. 1977); Illinois Migrant Council v. Pilliod, 398 F.Supp. 882, 887 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir. 1976); rehearing en banc, 548 F.2d 715 (7th Cir. 1977); Lee v. INS, 590 F.2d 497, 498 (3rd Cir. 1979)), on common carriers (see English v. Sava, No. 80 Civ. 1521 (S.D.N.Y. Sept. 22, 1983)), and in homes and sleeping quarters (see Zepeda v. U.S. INS, 708 F.2d 355, 357-58, 364-65 (9th Cir. 1983); Illinois Migrant Council v. Pilliod, supra, 398 F. Supp. at 888-91.

In each of the raids described in the record, armed agents of the INS descended upon a factory, displaying intimidating trappings of authority: handcuffs, badges, and electronic communications equipment. J.A. 78, 83, 150. In some of the raids, the agents were accompanied by officers from the Los Angeles Police Department. J.A. 91-92, 111. Upon arriving at a factory, INS agents immediately secured the exits of the building and prevented workers who attempted to leave from doing so. J.A. 82, 158.[3]

Agents then commenced the systematic row-by-row interrogation of persons employed at the factory, concentrating on

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3 As Herman Delgado testified: "First thing I saw was people running, and I heard a couple of people say 'the immigration' in Spanish so I started looking up toward the front and then I seen people with badges being stationed by the doors. They wouldn't let nobody out." (J.A. 82). Francesca Labonte testified that "they were blocking everybody inside." (J.A. 146).

workers of Latin descent while ignoring employees of other racial and ethnic characteristics. E.g., J.A. 86. As agents systematically swept through the factory to conduct their interrogations, work generally came to a halt as supervisors attempted to reassure surprised and anxious employees. J.A. 89, 107, 116. The interrogations lasted for up to two hours. As the government concedes, INS agents did not hesitate to use force in order to effect arrests. J.A. 78, 141-42.

SUMMARY OF ARGUMENT

The mass seizures at issue herein impermissibly violate the Fourth Amendment.

First, notwithstanding the government's assertions to the contrary, the facts of this case clearly show that each

person in the targeted factories was seized within the meaning of the Fourth Amendment when the INS sealed off the exits during its factory raids. The INS's restriction of the workers' freedom to leave, both actually and by an intimidating show of force, constituted such an intrusion upon the personal liberty and security of those workers as to be a "seizure" under any reading of this Court's decisions.

Second, the mass seizures are unreasonable under the Fourth Amendment because they are not based on any articulable suspicion that particular persons were aliens illegally in this country. The requirement that no person be seized unless he is particularly suspected of wrongdoing is necessary to constrain the exercise of discretion by government agents in the field, to protect innocent persons from governmental intrusion, and

to prohibit the exercise of arbitrary government power. That is shown by the historical context in which the Fourth Amendment was conceived and adopted, and by this Court's own decisions (a) requiring particularized suspicion as a predicate to a seizure and (b) decrying the use of mass detentions in other contexts.

Finally, the intrusion upon personal liberties engendered by the INS's area control operations is so great that it cannot be justified on any of the narrow grounds upon which this Court has in the past relaxed the standard of strict particularized suspicion.

I

THE FOURTH AMENDMENT PROHIBITS THE INS FROM USING AREA CONTROL OPERATIONS TO SEIZE PERSONS WHO ARE NOT PARTICULARLY SUSPECTED OF WRONGDOING

When INS agents descended upon the factories and sealed off their exits for

several hours, each employee was "seized" within the meaning of the Fourth Amendment. Under the standards adopted by this Court, a seizure occurs when a government agent "accosts an individual and restrains his freedom to walk away," Terry v. Ohio, 392 U.S. 1, 16 (1968), or when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980). Under these standards it is clear that a seizure occurred in this case. The workers were physically detained; given the manner in which the INS entered, any reasonable person would believe, as did

the workers (supra at p.5 n.3), that he was not free to leave.[4]

At the time of the seizure, however, INS agents had no reason to suspect that Mr. Delgado and the other individual respondents were aliens at all, much less aliens illegally in the United States. INS agents harbored merely a generalized

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[4] The government argues that the liberty of the workers was restrained "only in a theoretical sense," since at the times when the raids were conducted "employees presumably were obligated to their employer to be be present at their work stations" and consequently were not "free to leave." (Pet. Br. at 23). It is quite clear from the record, however, that the restraints on liberty which were imposed by the INS agents were far from "theoretical." INS agents repeatedly prevented persons from leaving factory areas (J.A. 82-83); and they admitted that any person who attempted to leave a factory location would be pursued and stopped (J.A. 158). Whatever the economic consequences might have been, on a normal working day, for a worker who left his position during working hours, he was nevertheless always free to walk away. In a free society, that is his privilege. When INS agents secured the factories' exits, that liberty was extinguished.

suspicion that an unknown number of workers might be illegal aliens.[5]

Under the Fourth Amendment, the state may not restrain the liberty of any person for an appreciable length of time unless there are specific articulable reasons to subject that particular person to such treatment. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Terry v. Ohio, supra, 392 U.S. at 21 n. 18.

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5 The INS entered the factories pursuant either to the owners' consent or warrants to search the premises for "property, namely persons, namely illegal aliens." ILGWU v. Sureck, 681 F.2d 624, 627 n.5 (9th Cir. 1982). As the government conceded below and as the Ninth Circuit found, id. at 629 n.8, the owners' consent and the non-specific search warrants gave the INS agents only the authority to pass the factory gates onto the owners' property. They could not have divested the individual worker of his Fourth Amendment right to be free from unreasonable seizures. See Delaware v. Prouse, 440 U.S. 648, 663 (1979), citing Terry v. Ohio, 392 U.S. 1 (1968).

That "central teaching" -- the particularity requirement -- is a product of the Colonists' resentment of and hatred for British practices by which government officers could search geographical areas and seize persons virtually at will. They adopted the Fourth Amendment to prevent precisely the type of general search which is at issue herein.

The INS argues that, notwithstanding the Fourth Amendment, it may seize any person, not on the basis of particularized suspicion, but merely because he is present in a suspicious place. However, the history of the Fourth Amendment and the decisions of this Court make clear that a person's mere presence in a suspicious geographical location is not

of itself a permissible reason to seize and interrogate that person.[6]

A. The Fourth Amendment Was Drafted to End a History of Seizures Not Based on Individual Suspicion

The Fourth Amendment was adopted explicitly to protect persons against the government's ability to seize them and their property in the absence of particularized suspicion. It was the Framers' institutional reaction to the Crown's oppressive general warrants and writs of assistance, which permitted the seizure

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6 Since the INS did not even have reasonable suspicion to suspect any person seized of wrongdoing, it is unnecessary to discuss whether the higher standard of probable cause should be required as a predicate to these operations.

of persons and things not particularly named and described.[7]

The unfettered discretion to search and seize which the writs and warrants gave to government officers inevitably led to harassment of the innocent. Although ineffectual to stem the use of general warrants until the eighteenth century, the English common law had long recognized and sought to protect against their abuses. Eminent seventeenth cen-

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7 The writs of assistance issued during the Colonial Period amounted to "roving commissions" empowering their holders to conduct exploratory searches for contraband. The general warrants, used contemporaneously in England, permitted the seizure of unspecified persons connected with printing seditious libel.

See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 37-49, 51-75 (1937) (hereafter "Lasson"); Landynski, Search and Seizure and the Supreme Court, 21-37 (1966) (hereafter "Landynski").

Both Lasson and Landynski have been frequently relied upon by this Court. See, e.g., Payton v. New York, 445 U.S. 573, 583 n.21 (1980); Warden v. Hayden, 387 U.S. 294, 301 n.9 (1967).

tury jurists sought to limit the scope of warrants to particularly named places, things and persons. For example, Chief Justice Hale, in his History of the Pleas of the Crown, declared that warrants to search any unspecified places for stolen goods were invalid and should be restricted to permit search only in particular places, and then only after a showing, upon oath, of the probable cause to the satisfaction of a magistrate.[8]

In the Colonies, the general warrants to search and seize took the form of the Colonial writs of assistance. Those writs conferred upon customs officers unlimited discretion to search for smuggled goods, and permitted them to enter and search homes and businesses at

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8 Lasson, supra note 7, at 35-37; Landynski, supra note 7, at 26-27, both citing Sir Matthew Hale, History of the Pleas of the Crown (1847).

will, even with no suspicion that smuggled goods were to be found.[9]

In 1761, in what has come to be known as The Writs of Assistance Case, sixty-three Boston merchants unsuccessfully petitioned the Superior Court of Massachusetts to deny the grant of new writs of assistance to Paxton, a customs official. In his famous argument, James Otis, representing the merchants, focused on the writs' lack of specificity and argued that the statutory language authorizing the writs should be construed to permit the issuance of special writs only; he called the general warrant "the worst instance of arbitrary power, the

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9 The most authoritative account of the writs of assistance in the Colonies is the work by Horace Gray, Jr. (later Chief Justice of Massachusetts and Justice of this Court), which constitutes Appendix I of Quincy's Reports of Massachusetts Bay, 1761-1772, at. 395-540.

most destructive of English liberty, that ever was found in an English law book."[10]

After the Writs of Assistance Case, the English common law courts declared mass seizures pursuant to general warrants illegal, and held persons acting under them liable for trespass and false imprisonment. The most famous cases involved John Wilkes, renegade member of Parliament and anonymous author of the seditious North Briton, which regularly criticized the King, his ministers and the policies of government. After he published Number 45, a particularly nettlesome piece critical of the King, the government issued a broad warrant to search for and seize the unknown authors, printers and publishers of The North Briton, No. 45. Much as the INS did here, the King's messengers proceeded to

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10 J. Adams, Life and Works of John Adams, Vol. II, at 523, reprinted in Landynski, supra note 7, at 34.

arrest forty-nine persons in three days in their search for the culprits. They eventually arrested Wilkes.[11]

In one of the several resultant proceedings, Chief Justice Pratt declared the warrants illegal, stating, "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."[12] In deciding Wilkes's own suit for trepass against the bearers of the warrant, Pratt again decried the warrants' lack of particularity:

> The defendants claimed a right under precedents to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wher-

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11 Lasson, supra note 7, at 43-44; Landynski, supra note 7, at 28.

12 See Huckle v. Money, 2 Wils. K. B. 206, 95 Eng. Rep. 768 (1763).

> ever their suspicion may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this Kingdom, and is totally subversive of the liberty of the subject.[13]

Several years later, as reported in the oft-cited case, Entick v. Carrington, 19 Howell's State Trials 1029 (1765), another warrant was challenged which was specific as to the person to be searched but general as to the papers to be seized. In an opinion which this Court has recognized as a landmark of English liberty,[14] Pratt, now Lord Camden, again focused on the issue of particularity, noting that since the government claimed broad power to engage in non-particularized general searches, "one should naturally expect that the law to

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13 Wilkes v. Wood, 19 Howell's State Trials 1153, 1167, 98 Eng. Rep. 489 (1763) (emphasis added), reprinted in Lasson, supra note 7, at 45.

14 Boyd v. United States, 116 U.S. 616, 626 (1886).

warrant it should be as clear in proportion as the power is exorbitant."[15] Lord Camden found no law to warrant the government's power.

In the Colonies, opposition to writs of assistance continued to spread beyond Boston with the passage of the Townshend Revenue Act of 1767, which authorized the issuance of writs of assistance throughout the Colonies. In the aftermath of North Briton and Entick, Colonial judges generally refused to grant applications for writs of assistance under the Act, despite persistent pressure by British officials.[16] The Colonists followed with

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15 Entick v. Carrington, supra, reprinted in Lasson, supra note 7, at 18.

16 Massachusetts and New Hampshire had standing writs prior to the 1767 initiative. No record exists of applications for the Townshend writs to have been made in either New Jersey or in North Carolina. However, the Townshend Act applications caused the writ of assistance controversy to develop acutely in Rhode Island, Connecticut, New York, Pennsylvania, Maryland, East Florida, Georgia, South Carolina, and Virginia.

interest the government's attempts to obtain the new writs, and ultimately responded with the petition which the Continental Congress addressed to George III on October 24, 1774, requesting the redress of customs officers' unlimited power to engage in general searches.[17]

The Fourth Amendment was presaged by the provisions that seven of the original Colonies, in direct reaction to the British customs practices, incorporated into their state constitutions.[18] All of them condemned any grant to the government of authority to seize "any" person or persons not specifically named.[19] Those state constitutional provisions, and in particular the provisions from the

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17 Lasson, supra note 7, at 75.

18 Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire.

19 Lasson, supra note 7, at 79-82 (collecting relevant portions of state constitutions).

Virginia, Pennsylvania and Massachusetts constitutions, were the precedents for the Fourth Amendment.

On June 8, 1789, James Madison, drawing on the experience of the state constitutions, presented his proposals for the Fourth Amendment to the United States Constitution to Congress. The final version of the Amendment was delivered from Congress for state ratification in its current two clause form. All drafts shared the final version's prohibition of warrants issued without probable cause and not particularly describing the persons to be seized.

B. The INS In Its Area Control Operations Exercises Unconstitutionally Broad Discretion to Seize Persons Not Particularly Suspected of Wrongdoing.

History clearly evidences that the dangers posed by blanket, general warrants were foremost in the Framers' minds when they drafted the Fourth

Amendment. They considered general warrants manifestly unreasonable and explicitly outlawed them. Nevertheless, the INS argues to this Court that it is "reasonable" for the government to seize a person, without warrant, whom it has no reasonable basis to believe has done anything wrong, if that person is merely present in a place suspected of harboring some illegal aliens.

The factory raids pose two distinct challenges to basic Fourth Amendment rights. First, they are indiscriminate; they depend upon a governmental power to seize innocent persons in the pursuit of the guilty. In every factory raid, the government seizes and detains dozens of innocent persons -- persons whom the government has no reason to believe are anything but law-abiding citizens or resident aliens. The government thus casts its net too broadly. The

individual becomes only a part of a group, and personal liberties are lost.

The second challenge posed by factory raids to Fourth Amendment rights is their selectivity. Having sealed off a factory and cut off all the persons inside, the INS agents are free to roam through the building, picking out those persons whom they will let alone and those they will pursue.

The extension of such unbridled discretion to INS agents in the field is particularly disturbing because their actions are often triggered by the detainees' ethnic appearance or their presence in ethnic enclaves. It appears from the record that the respondents here were interrogated by INS agents primarily because they are Hispanic. Needless to say, race and ethnicity are impermissible bases on which to detain and interrogate a person, United States v. Brignoni-

Ponce, 422 U.S. 873, 885-87 (1975).

The particularity requirement of the Fourth Amendment acts to restrain both indiscriminate government intrusions and improper selectivity. First, discretion is easily abused during area control operations because large numbers of people are indiscriminately seized and agents are then free to choose among them. This discretion is substantially reduced when enforcement officers must have a basis for suspecting an individual prior to seizing him. See, e.g., Delaware v. Prouse, 440 U.S. 648, 661 (1979); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

Second, the particularity requirement limits government intrusion those person who are legitimate targets of investigation. In this sense, it is a rule that protects the innocent by preventing the government from assuming

guilt by association or guilt by mere physical presence. See, e.g., Brown v. Texas, 443 U.S. 47, 51-52 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).

Finally, the particularity requirement prevents government from exercising powers that are abhorrent to a free society. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), this Court recalled the words of Justice Jackson, soon after his return from the Nuremberg Trials:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

Id. at 274 (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

In recent years, while recognizing the needs of law enforcement programs, this Court has rebuffed attempts to destroy the particularity mandate of the Fourth Amendment. It has invalidated practices which would permit the random detention of persons absent reasonable, particularized suspicion, and it has similarly rejected attempts to base reasonable suspicion on the mere fact that a person may be present in a geographical area where illegal activity occurs.

For example, this Court has ruled that except at permanent fixed checkpoints,[20] drivers and occupants of automobiles may not be stopped, detained and questioned unless they are reasonably and particularly suspected of wrongdoing. One of the first cases in which that principle was announced involved

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20 See United States v. Martinez-Fuerte, 428 U.S. 543 (1976), discussed infra at 49-53.

another INS tactic -- the so-called "roving patrol." In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court held that, except at the border or its functional equivalent, the INS "may stop vehicles only if . . . [its officers] are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Id. at 884 (footnote omitted).

Similarly, in Delaware v. Prouse, 440 U.S. 648 (1979), this Court again spoke against detaining drivers without particularized suspicion. In Prouse, a state patrolman stopped the respondent's car, ostensibly to check the driver's license and registration, solely because the patrolman had nothing else to do. Id. at 650-51. This Court, recog-

nizing the danger to Fourth Amendment rights posed by such arbitrary invasions of personal privacy, held again that

> except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."

Id. at 663.

However, the INS nonetheless suggests that if it suspects that some illegal aliens will be found in a factory, then it can detain all the factory workers for questioning (Pet. Br. at 41). The INS thus urges that a person may be seized simply because he happens to be in the wrong place at the wrong time, with no regard paid to whether he is himself suspect. The INS argues, in effect, that the Fourth Amendment permits a lesser degree of guilt by association -- suspi-

cion by association.

This Court, however, has consistently rejected both the concept of "suspicion by association" and its close cousin, "suspicion by statistical inference." For example, the INS urged unsuccessfully in Brignoni-Ponce, supra, 422 U.S. 873 (1975), that stopping an automobile whose occupants appeared to be Mexicans was justified by the statistical fact that many Mexicans are in the country illegally. This court ruled, quite properly, that Mexican ancestry does not in itself warrant a suspicion of wrongdoing. "The likelihood that any given person of Mexican ancestry is an alien . . . standing alone . . . does not justify stopping all Mexican-Americans to ask if they are aliens." Id. at 886-87.

Similarly, in Brown v. Texas, 443 U.S. 47 (1979), this Court held that a

police officer could not stop and question a person solely because he was present in an area having a high incidence of drug traffic. This Court "required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. . . . The fact that the appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." Id. at 51-52 (emphasis added).

In short, government officers must have a reasonable suspicion that the particular person to be detained for questioning is engaged in unlawful activity, and cannot base that suspicion merely upon a person's membership in a "high-risk" ethnic or other group[21] or

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[21] A more difficult example arises when persons (footnote continued)

presence in a place where unlawful activity is known to take place.

It is clear, therefore, that dragnet searches of the sort that the INS conducted here, in which large groups of persons who cannot possibly be individually suspected of unlawful conduct are detained en masse and subjected to scrutiny, are impermissible under our Constitution. Although this may be the first case to reach this Court involving mass detentions of such large numbers of innocent persons in order to ferret out a

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are detained because they fit the so-called "drug courier profiles" now used in major airports to detect transporters of narcotics. Although this Court has yet to review a case in which a person was seized solely because he fit the profile, Justice Powell, in his concurring opinion in United States v. Mendenhall, 446 U.S. 544 (1980) in which Chief Justice Burger and Justice Blackmun joined, doubted that a person could be detained for questioning and search solely on the basis of the drug profiles statistics. "I do not believe that these statistics establish by themselves the reasonableness of this search. Nor would reliance upon the 'drug courier profile' necessarily demonstrate reasonable suspicion." Id. at 565 n.6.

few unknown guilty persons, this Court has not countenanced the use of similar tactics in the past.

In Davis v. Mississippi, 394 U.S. 721 (1969), the police, in the course of investigating a rape, rounded up scores of black youths and detained them for questioning and fingerprinting before releasing them. The fingerprints obtained were sent to the FBI for comparison with prints found at the scene of the crime. One such youth was ultimately charged with the crime and convicted on the basis of fingerprint evidence. This Court held that the fingerprint evidence obtained from the petitioner was inadmissible, because it was obtained by an unlawful seizure. The Court sharply criticized the mass detentions employed by the police:

> Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention.

> Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Id. at 726-27 (footnote omitted).

This Court also criticized the mass detention that occurred in Ybarra v. Illinois, 444 U.S. 85 (1979). In Ybarra, police armed with a warrant to search a bar and its bartender proceeded to detain and "frisk" the patrons as well. The appellant was charged and convicted of possessing narcotics on the basis of evidence found in the course of the search. This Court held that the police had no right to detain the patrons of the bar, none of whom they could reasonably suspect of being engaged in wrongdoing, solely on the basis of their presence in the bar:

> [T]he agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a

> time when the police had reason to believe that the bartender would have heroin for sale.
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> . . .But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40, 62-63 [1968]. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidently there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91.[22] See also United States v. Di Re, 332 U.S. 581 (1948) (mere presence in the same automobile with persons

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22 It should be noted that, unlike in Ybarra, and despite the amount of discretion that the INS exercises in seizing and interrogating persons through its area control operations, the INS usually does not even demonstrate to a magistrate that probable cause sufficient to obtain a warrant exists to believe that the places where it wishes to conduct interrogations harbor some number of illegal aliens. (J.A. 47). See Michigan v. Summers, 452 U.S. 692, 696-97 (1981); Dunaway v. New York, 442 U.S. 200, 210-12 (1979). That it does not do so, nor deem itself required to do so, makes the INS area control operations all the more dangerous to individual liberty.

subject to lawful arrest did not provide probable cause to search respondent).[23]

Notwithstanding the systematic decisions of this Court, the INS argues that "suspicion by statistical inference" should be a proper standard under the Fourth Amendment. The INS poses hypotheticals by which it argues that if officers have probable cause to believe that 99 out of 100, or, even seven out of ten, persons in a factory are illegal aliens, they have sufficient cause to detain all (Pet. Br. at 29, 41). Those hypotheticals do not, of course, reflect the facts of this case. They may present, at best, situations in which the location to be investigated is so

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23 See also Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), mod., 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1982) (Brennan, J., dissenting), for another disturbing example of the use of mass seizure as a law enforcement tactic.

inextricably bound up with wrongdoing that everyone closely connected with it can individually be suspected of being a party to it. An example of such a situation is contained in United States v. Cortez, 449 U.S. 411 (1981), in which this Court held that, given sufficient facts from which to conclude that a particular automobile is engaged in illegal smuggling, it is not unreasonable to stop that automobile and question its occupants to determine if they are smugglers. Another example is Michigan v. Summers, 452 U.S. 692 (1981), in which this Court held that, given probable cause sufficient to obtain a warrant to search a house for illegal narcotics, it is permissible to detain the occupants of the house during the search. In both those cases, the seizures of the persons were less intrusive than the search of their property, which was justified on

the basis of particularized suspicion. Here, however, we are not dealing with a location so rampant with illegality that all who are present can be suspected of wrongdoing. These raids were not conducted on a thieves' den or an illegal betting parlor; they were conducted on lawful business premises. The persons seized were engaged in lawful endeavors, and in each case a relatively small number of the persons seized were found to be offenders at all.

There is no reason under the language or purpose of the Fourth Amendment to require less than particularized suspicion to justify an investigatory seizure of an entire work force. Mass detentions of innocent persons, whether conducted by INS agents or police officers, are not a permissible law enforcement weapon in a free society. The Fourth Amendment, illuminated by

history and supported by this Court's decisions, demands that conclusion. Accordingly, the Ninth Circuit's decision below is correct and should be affirmed.

II

THE FACTORY RAIDS CANNOT BE JUSTIFIED AS AN EXCEPTION TO THE REQUIREMENT OF INDIVIDUALIZED SUSPICION UNDER THE FOURTH AMENDMENT

The government cites but notably does not rely on the fact that this Court has established a very small number of narrow exceptions in which the government may conduct a search or seizure without individualized suspicion of illegal conduct.[24] None of these exceptions, most of which have deep historical roots, bear on this case. The narrow exceptions

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[24] The government itself does not argue that the factory raids fit any of the established exceptions. It merely lists the exceptions as examples of searches and seizures conducted without individualized suspicion (Pet. Br. at 41-42). But it has not even attempted to show that any of these examples justify the factory raids, nor could any such showing be made.

include government conduct which has a very long history of acceptance -- sometimes as long as the Fourth Amendment itself. Moreover, all of the exceptions involve only the most limited kind of government intrusion into the area of protected Fourth Amendment rights, and in most cases do not even involve the seizure of persons. The factory raids at issue here do not fall into any of the exceptions, nor are they even remotely analogous to those exceptions.

A. The Factory Raids Cannot Be Justified as Administrative Inspections

This Court has permitted administrative area inspections without particularized suspicion of illegal conduct in two circumstances: routine inspections of residential and commercial property necessary to enforce health and safety codes, Camara v. Municipal Court, 387 U.S. 523, 538 (1967); See v. City of

Seattle, 387 U.S. 541 (1967), and routine inspections of the premises of certain pervasively regulated industries to ensure compliance with those regulations. Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). However, the Fourth Amendment interests involved in the two lines of cases that those decisions represent are fundamentally different from the interests involved in factory raids.

The administrative inspection cases involve only the government's power to enter property and to conduct a limited search of that property. The administrative search is completely impersonal: a government employee inspects the premises to determine whether the premises comply with the applicable code or regula-

tions.[25] The only Fourth Amendment interest addressed in such cases is the expectation of privacy that the owner/occupant enjoys in his property. See, e.g., Donovan v. Dewey, supra, 452 U.S. at 598 (discussing the privacy interest of "the owner of commercial property . . . in such property"); United States v. Biswell, supra, 406 U.S. at 316 (discussing "the dealer's justifiable expectations of privacy"). But the rights of the property owner are not at issue here. As all agree, the property interest of the factory owners in these

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[25] For example, in Camara, which involved safety-code inspections of residential property, the Court emphasized that the searches were limited to "routine periodic inspections of all structures," 387 U.S. at 535-36, and that "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, [and therefore] they involve a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. Similarly, in Marshall v. Barlow's, at issue was the authority of OSHA inspectors "to search a plant" to discover "dangerous conditions outlawed by the Act includ[ing] structural defects . . . [and] a myriad of safety details." 436 U.S. at 316.

cases is wholly different from the personal privacy interest of his employees.

The administrative inspection cases say nothing about the government's power to seize persons found on the premises. None of the administrative inspections that have been reviewed by this Court involved the seizure of persons, nor did they involve the Fourth Amendment rights of any employees on the premises. Such inspections, which are not "personal in nature," Camara, supra, 387 U.S. at 537, do not encompass and cannot justify the seizure and detention of people during a factory raid.

Moreover, none of the special factors which combine to make the limited intrusion of administrative inspections "reasonable" within the meaning of the Fourth Amendment apply to the factory raids. In most cases, the administrative

inspection was upheld at least in part because of a very long tradition of public acceptance.[26] However, no such tradition underlies factory raids by the INS, which were commenced less than ten years ago.[27] Thus, for example, while "a [firearms] dealer chooses to engage in this pervasively regulated business and to accept a federal license, . . . [and] does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection,"

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26 Thus, in Camara the Court held that code-enforcement inspections were reasonable within the meaning of the Fourth Amendment in part because "such programs have a long history of judicial and public acceptance." 387 U.S. at 537 (citing Frank v. State of Maryland, 359 U.S. 360, 367-71 (1959)). Similarly, the Court has noted that the administrative inspections of business premises selling liquor (considered in Colonnade) and firearms (considered in Biswell) were justified by the "long tradition of close government supervision." Marshall v. Barlow's, Inc., supra, 436 U.S. at 313.

27 Hearings on Undocumented Aliens Before the Subcommittee on the Department of State, Justice & Commerce, the Judiciary, and Related Agencies, 95th Cong., 2d Sess. 324 (1978).

United States v. Biswell, supra, 406 U.S. at 316, a citizen or resident alien, such as Mr. Delgado, who goes to work in a garment factory has no reasonable expectation that he will be subjected to repeated detention by the government without any suspicion of wrongdoing on his part.

Furthermore, unlike the factory raids at issue herein, the administrative inspections upheld by this Court have allowed the inspectors little discretion. The fear of abuse of discretion by an agent in the field was the focus of the Court's concern expressed in all of the administrative search. Thus, the issue in each case was not whether the administrative inspections could be conducted at all, but whether a warrant was required to delineate and curtail the scope of the agent's powers. See, e.g., Camara v. Municipal Court, supra, 387 U.S. at 533.

For example, the Court in Marshall v. Barlow's, supra, found that the authority to conduct inspections under Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), ("OSHA") was unconstitutionally broad. OSHA flatly authorizes administrative inspections of any factory and empowers inspectors to question any owner or employee. The statute does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search and interrogate. Finding that Section 8(a) "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search," 436 U.S. at 323, this Court held that a warrant was constitutionally required to conduct an administrative

inspection under that Section. See Donovan v. Dewey, supra, 452 U.S. at 600-01 (discussing Marshall v. Barlow's supra).

In the instant case, INS agents seized entire work forces during the factory raids without any limits to their discretion from either warrants or authorizing statute. As set forth above, the warrants in factory raids define the agents' mission only in the broadest, most sweeping terms. See note 5 infra. The statute does not specifically authorize factory raids, much less provide guidance to limit the agents' discretion in conducting such raids. The government relies on 8 U.S.C. § 1357(a)(1), which contains only a general grant of power to immigration officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." This statute permits

exactly the sort of "unbridled discretion" of the officer in the field that the Court disapproved in Marshall v. Barlow's. Thus, this case does not fall within the category of the administrative inspection cases because the factory raids do not involve merely the routine inspection of property. However, even if they did, the warrantless factory raids would be unconstitutional because they leave the subjects of the raid subject to "[t]he 'grave danger' of abuse of discretion." Delaware v. Prouse, 440 U.S. 648, 662 (1979) (citation omitted).

Under the teaching of Camara, Marshall v. Barlow's, and the other administrative inspections cases, it is clear that administrative inspectors could, pursuant to warrant, enter the plants in question and inspect them for building code violations and similar regulatory infractions. To suggest that

those cases also validate the wholesale seizure of all the persons employed at those factories is to equate people with property and to ignore the great potential for abuse inherent in the exercise of such unrestrained and arbitrary power.

B. The Factory Raids Cannot Be Justified as Investigatory Stops Near the Border

The Government also relies on United States v. Martinez-Fuerte, 428 U.S. 543 (1976), which involved investigatory stops of automobiles conducted near the Mexican border, and which represents the only case in which the Court has tolerated even a very brief seizure of persons without individualized suspicion. In Martinez-Fuerte, the Court permitted the Border Patrol to stop all vehicles at permanent checkpoints near the Mexican border to inquire into the citizenship and immigration status of the occupants without any particularized suspicion that

a given vehicle contained an illegal alien. While the Court reaffirmed that "individualized suspicion is usually a prerequisite to a constitutional search or seizure," id. at 560, it upheld the use of fixed-checkpoints because of the extremely minimal intrusion of the checkpoint stop and because of the special problems of policing the Mexican border.

On its face and by its terms, Martinez-Fuerte was limited to activities of the Border Patrol within 100 miles of the Mexican border. 428 U.S. at 545, 549-50, 552 (checkpoints 66 miles and 65-90 miles from the Mexican border maintained at intersection of roads leading from the border). The Martinez-Fuerte exception does not, therefore, apply to factory raids conducted throughout the United States, and provides no justification for the relaxation of the individualized suspicion requirement in the

instant case.

Perhaps more importantly, the checkpoint stops in Martinez-Fuerte were held to be reasonable because of their extremely brief, unintrusive nature. Thus, the Court emphasized that "the potential interference with legitimate traffic is minimal," 428 U.S. at 559, the stops are "routine," and "[t]he objective intrusion of the stop and inquiry . . . remains minimal." Id. at 560. The average length of an investigative stop was only three to five minutes. Id. at 547.[28]

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28 The Court also identified specific elements peculiar to the fixed checkpoints that minimized the government's intrusion on Fourth Amendment rights. First, because the checkpoints are fixed, motorists "are not taken by surprise" and "they know . . . [they] will not be stopped elsewhere." 428 U.S. at 559. The Court found that "the stops should not be frightening or offensive because of their public and relatively routine nature." Id. at 560. Second, checkpoint operations "involve less discretionary enforcement activity"; the Court found that the "regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding

(footnote continued)

Finally, the Court relied on the especially limited "expectation of privacy in an automobile and of freedom in its operation" and the fact that similar "[s]tops for questioning . . . are used widely at state and local levels." Id. at 560 n.14, 561; see also Texas v. Brown, 51 U.S.L.W. 4361, 4367 n.1 (U.S. Apr. 19, 1983) (No. 81-419) (Powell, J., concurring). Each of these factors, peculiar to fixed checkpoints, is critical: The Court emphasized that only because of such factors were the nonparticularized stops permissible. See 428 U.S. at 558-59 (contrasting roving-patrol stops). As the Court stated in summary,

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motorists, that the stops are duly authorized and believed to serve the public interest." Id. at 559. Moreover, the discretion of the officers in the field is constrained because the choice of location of the checkpoint is determined by their superiors. Id. In addition, "since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." Id.

"our holding today is limited to the type of stops described in this opinion. '[A]ny further detention . . . must be based on consent or probable cause.'" Id. at 567 (citation omitted).

Factory raids share none of the mitigating factors, cited by the Court in Martinez-Fuerte. Indeed, the detentions of the work forces in the instant case were substantially more intrusive than the stops in Martinez-Fuerte. Rather than lasting three to five minutes, the detention lasted up to two hours during which time work was disrupted and individual workers were subjected to serious intrusion into their security and their privacy. As the Court recently stated in United States v. Place, 51 U.S.L.W. 4844, 4848 (U.S. June 20, 1983) (No. 81-1617), "although we decline to adopt any outside time limitation for a permissible Terry stop, we have never

approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case."[29]

Moreover, in contrast to fixed-checkpoint stops, factory raids catch the employees by surprise and subject them to the unrestricted discretion of INS field agents as they roam throughout the building. In the instant case, the selection

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29 See also Florida v. Royer, 51 U.S.L.W. 4293, 4295 (U.S. Mar. 23, 1983) (No. 80-2146) (plurality opinion) (White, J.) ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."); id. at 4298 (Brennan, J., concurring) ("The scope of a Terry-type 'investigative' stop and any attendant search must be extremely limited or the Terry exception would 'swallow the general rule that Fourth Amendment seizure [and searches] are "reasonable" only if based on probable cause.' . . . In my view, any suggestion that the Terry reasonable suspicion standard justifies anything but the briefest of detentions or the most limited of searches finds no support in the Terry line of cases.").

of the factory and the supervision of the raid were apparently carried out by the same officials. J.A. 52-53. The record indicates that the shock and coercive nature of the raids were deeply disturbing to the persons involved.

By seeking to extend the Martinez-Fuerte exception into the interior, the government would dramatically expand its power to invade the everyday business and commercial life of American citizens and resident aliens. See U.S. v. Brignoni-Ponce, 422 U.S. at 882-84.[30]

30 The government argues that Brignoni-Ponce provides support for the factory raids because the Court did not specify that the officers need possess reasonable suspicion with respect to every occupant (Pet. Br. at 42). However, this mischaracterizes the Court's decision. For example, in United States v. Cortez, 449 U.S. 411, 417-18 (1981), the Court cited Brignoni-Ponce for the rule that "detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."

The Court in Brignoni-Ponce, stated that all of the Border Patrol's traffic-checking operations are aimed at vehicles smuggling illegal aliens across the border or from the border
(footnote continued)

In Martinez-Fuerte and related cases, this Court found that minimal intrusions upon personal liberty were justified by the virtually "impossible" law enforcement task of patrolling the 2000-mile long Mexican border.[31] In this case, the level of intrusion sought by the government is substantially greater

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area, 422 U.S. at 879; the nature of this illegal alien traffic generates certain specific grounds for identifying violators, id. at 883; and the Court defined the reasonable suspicion required to stop a vehicle as reasonable suspicion of such "smuggling operations." Id.; see id. at 885 ("the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling"). Thus, the Court was clearly focusing on "smuggling operations," and obviously everyone in an automobile engaged in smuggling is implicated in the smuggling by his very presence. By contrast, the vast majority of the persons in the raided factories in the instant case were citizens or legal aliens and their presence in those factories did not implicate them in any unlawful activity.

31 United States v. Brignoni-Ponce, supra, 422 U.S. at 879 ("The Mexican border is almost 2000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings."); see also Michigan v. Summers, 452 U.S. 692, 698-99 (1981).

than in any previous case; yet the government has failed to demonstrate a commensurately compelling need for the exceptional relaxation of constitutional standards which it seeks.

The area control operations conducted by the INS are a minor part of the government's overall immigration enforcement program. Eighty-five percent of the illegal aliens apprehended in 1982, for example, were caught by Border Patrol officers, who conduct traffic control operations such as those discussed in Martinez-Fuerte.[32] The remaining fifteen per cent of the apprehensions resulted from several different types of INS operations, of which factory raids are only one method. The government has failed to demonstrate that the factory raids significantly deter the entry of

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32 United States Department of Justice, Monthly Report of Deportable Aliens Found in U.S. By Nationality, Status at Entry (fiscal year 1982).

aliens into the United States or that they substantially contribute to the permanent expulsion of undocumented aliens who have already gained entry. Indeed, the mounting evidence is to the contrary.

The preliminary findings of a study conducted at the University of California at San Diego, for example, suggest that most workers who were apprehended in an intensive series of INS factory raids in 1982 later returned to their jobs, sometimes only a few days after their seizure. In instances where the raids did produce job vacancies, very few of the jobs were then taken by United States born or legally resident aliens.[33] There is no substantial evidence that factory raids permanently contribute to reducing the number of illegal aliens or that they

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33 Center for U.S.-Mexican Studies, University of California - San Diego, Overview of Activities, 1980-1983, at 58-60 (July 1983).

serve to create substantial numbers of employment positions for citizens and other legal residents.

In summary, neither the degree of intrusiveness nor the extent of the government interest justifies extension of Martinez-Fuerte to factory raids.[34]

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[34] The Government also relies on United States v. Villamonte-Marquez, 51 U.S.L.W. 4812 (U.S. June 17, 1983) (No. 81-1350), in which the Court held that customs officers may board vessels in waters providing ready access to the open sea without any suspicion of a law violation. Factory raids, however, cannot be justified as a boarding of vessels. Villamonte-Marquez rested on (1) the 200-year history and approval of such boardings; (2) the limited nature of the intrusion -- the officers merely inspect the vessel's documentation and visit public areas of the vessel; and (3) the importance of such boardings in the regulation of certain trades, of imports and exports, for the collection of customs duties and to prevent the entry of illegal weapons, diseased animals, and adulterated foods, as well as illegal aliens. None of these elements apply to factory raids, and this exception, like the others, is totally inapposite.

CONCLUSION

For the foregoing reasons, the court below was correct in holding that the INS area control operations at issue here were unreasonable seizures in violation of the Fourth Amendment. Accordingly, this Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

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